82-1793

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
and DIRECTOR OF THE DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL,
Petitioners,

vs.

LEWIS-WESTCO COMPANY,
Respondent.

PETITION FOR CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether A State Statute Requiring Each Liquor Wholesaler To Periodically File Price Schedules With The State And Be Bound By Them Violates The Sherman Act?

2. Where A State Licensed Wholesaler Binds Only Itself In Posting Prices, What Degree Of State Involvement Is Needed to Satisfy The State Action Requirement?

3. Where a State Liquor Regulation Does Not Require A Per Se Violation Of The Sherman Act, Can The State Rely Upon Competitive Forces To Operate Rather Than Fully Occupying The Area?

4. Did Congress Intend To Allow Invalidation Of State Liquor Legislation On Sherman Grounds Where It Withdrew All Of Its Commerce Power Over Such Legislation?

5. If The State Has A Valid Reason For A Liquor Regulation Does The 21st Amendment Prevail Over Sherman Act Policies?

LIST OF PARTIES

The parties are listed in the caption. Both Wine and Spirits Wholesalers of California and the California Beer Wholesalers Association sought to intervene in the Court of Appeal, but such intervention was denied.

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PETITION FOR CERTIORARI

DECISIONS BELOW

The California Court of Appeal decision sought to be reviewed—

Lewis-Westco & Co. v. Alcoholic Beverage Etc. Appeals Bd. (1982) 136 Cal.App.3d 829, is Appendix A.

The decision of the Appeals Board is Appendix B.

The decision of the Department is Appendix C.

JURISDICTION

Jurisdiction lies under 28 U.S.C. § 1257(3) since the decision challenged found a state statute in violation of the Sherman Act.

The Court of Appeal decision as modified was made on November 18, 1982.

Since the California Supreme Court denied our Petition For Hearing on February 3, 1983, this petition is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Texts are provided in Appendix D.

U.S. Constitution 21st Amendment, Section 2. California Constitution, Article 20, Section 22

FEDERAL STATUTES

15 USC § 1

27 USC §§ 121, 122

STATE STATUTES

Business & Professions Code

§ 23402
23815
24013
24400
24756
25500
25502
25503

Title 4, California Administrative Code § 100.

STATEMENT OF THE CASE

1. Lewis-Westco Company is a licensed California distilled spirits wholesaler. The State Department of Alcoholic Beverage Control filed charges against this license alleging that Lewis-Westco had violated Business and Professions Code section 24756 and Title 4, California Administrative Code section 100. These provisions of California law require, *inter alia,* a wholesaler to submit its price schedules to the Department by the 15th of the

month where they become public records. A wholesaler can amend its schedules to meet a lower price of a competitor up to the 1st of the following month. Thereafter it is bound to sell at those prices for 30 days. (At the time of these violations the period was 60 days.)

There was and is no dispute that respondent in fact sold distilled spirits at prices below those contained in the schedules it had filed with the Department. Respondent instead at the hearing attacked the price posting statute and its underlying regulation on the ground that they were invalid under the Sherman Act.[1] The Department after a hearing, found the violations to have occurred and imposed 10 day concurrent suspensions stayed upon certain probationary conditions. (See App. C.)

Respondent, as is required, appealed to the Alcoholic Beverage Control Appeals Board again challenging the constitutionality of the statute and regulation. The Appeals Board affirmed the decision. (See App. B.)

Respondent then filed a writ of review in the California Court of Appeal. The Court granted the writ and issued a decision finding the state statute and regulation in violation of the Sherman Act. The opinion, as modified on denial of rehearing was issued on November 18, 1982. The California Supreme Court denied hearing on February 3, 1983. (See App. A.)

While this case involves the wholesale level, a grasp of California's basic statutory system of liquor regulation is necessary to understand this matter. It is a three-tiered licensing system whereby distillers, wholesalers and retailers may operate only on one level. Business and Profes-

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[1]Lewis-Westco raised the constitutionality of the legislation in light of the Sherman Act both orally and in writing before the Department. Appendix E contains a few pertinent pages of the hearing transcript and written argument. Included also is an extract of Lewis-Westco's brief before the Appeals Board.

sions Codes § 25500 and 25502. Retail licenses are limited in number generally by population of the county. Business and Professions Code §§ 23815 et seq.. A retail license can be transferred or issued only after appreciable delays as not only government entities, but citizens can delay issuance by written protest. Business and Professions Code § 24013. A retailer may only purchase from a licensed wholesaler. Business and Professions Code § 23402.

Given these restrictions upon the retail level—difficult and delayed entry and limitation upon sources of supply—the regulatory system compensates by providing certain protections. One is the right of small retailers to band together to obtain quantity discounts through collective purchasing (pool buying). Business and Professions Code §§ 24400 et seq.. Another is a prohibition on price discrimination against retailers. Business and Professions Code § 25503(e).

The third, price posting, is at issue in this case. Price posting is a critical element in the State's overall alcoholic beverage regulatory program because it is what really makes the anti-price discrimination and pool buying provisions work. The price posting system whereby each wholesaler files its price schedules and is bound by them for a given period combined with the fact that these schedules are made public and regularly disseminated by private publications to retailers generally, provides the means for the early detection and effective prosecution of price discriminators. Moreover, retailers who elect to pool their money to take advantage of deep quantity discounts normally available only to large volume buyers are greatly assisted by the ready availability of the price postings on file with the Department. The retailers as well as the Department's investigators can determine almost instantly whether the price they have paid is consistent with prices charged other retailers purchasing under the same condi-

tions. In short, price posting provides vital protection to the small retailer and is a valuable enforcement tool for the Department.

The Court of Appeal found that the system *in effect* was a per se violation of the Sherman Act. It found that the state action exemption did not apply because the state was insufficiently involved and that the state interests were insufficient to invoke the 21st Amendment. The decision placed great stress upon similarity of prices in reaching its conclusion.

The Court of Appeal decision in this case confuses price fixing with price posting by holding the effects are the same; refuses to recognize that a state interest—here prevention of price discrimination—justifies price posting; holds similarity of prices alone is enough to show anticompetitive effects; and unreasonably limits the state action exemption by requiring excessive state involvement in the regulatory program.

In addition the most fundamental error of the Court of Appeal was its refusal to recognize the significance of *Rice v. Norman Williams Co., supra,* .... U.S. .... [73 L.Ed.2d 1042]. In that case this Court held that a state statute could not be invalidated under the Sherman Act merely because its *effect* lessened competition. This Court concluded that there had to be a clear facial conflict. The Court of Appeal chose not to follow that interpretation of the Sherman Act but rather followed the concurring opinion in *Norman Williams.*

2. Business and Professions Code section 24756 and rule 100 require wholesalers to post with the Department the prices at which *they* themselves will sell. They can lower the price list to match a lower price filed by a competitor.

Two things are apparent: the action of posting the prices with the Department is *compelled* by the state and this is *not* a price fixing statute as the wholesaler only binds itself.

Rather than a *grant* of economic power to a private party as occurred in *Rice v. Alcoholic Bev. Etc. Appeals Bd.* (1978) 21 Cal.3d 431 and *California Liquor Dealers v. Midcal Aluminum* (1980) 445 U.S. 97, this statute is actually a limitation upon a wholesaler's power.

As previously mentioned California extensively regulates alcoholic beverages (Cal. Const., art. XX, § 22). Those engaged in the business not only require licenses, which are restricted in number, but with limited exceptions, may only engage in only one of three levels in the distribution process. For an analysis of the underlying rationale, see *California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. Etc. Appeals Bd.* (1971) 5 Cal.3d 402, 407-408 and *National Distributing Co. v. U.S. Treasury Dept.* (D.C. 1980) 626 F.2d 997.

The distinction between price fixing and price posting was made clear in *Ralph's Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 180, 181, wherein the court stated:

> "We need not inquire into whether section 25006 meets this claimed test on specificity, however, because rule 105(a) does not constitute 'price fixing'. Rule 105(a) allows each manufacturer and wholesaler to set prices as he wishes. The price competition between brands remains unimpeded. Rule 105(a) only operates to prevent variations in the price established by the manufacturer and wholesalers."
>
> "The prohibition on a discriminatory price cannot be deemed a directive to fix a price; the manufacturer or wholesaler may sell at whatever he chooses, but he may not post different or discriminatory prices for one buyer than for another. The prohibition of price discrimination in the sale of beer is no more a mandate that beer be sold at a fixed price than the prohibition of race discrimination in the sale of property is a mandate that property be sold at a fixed price."

Thus the cases prohibiting *price fixing: Rice v. Alcoholic Bev., Etc. Appeals Bd.* (1978) 21 Cal.3d 431; *Capiscean Corp. v. Alcoholic Bev., Etc. Appeals Bd.* (1979) 87 Cal. App.3d 996; *Midcal Aluminum, Inc. v. Rice, supra* (1979), 90 Cal.App.3d 979 affirmed as *California Liquor Dealers Assn. v. Midcal Aluminum, supra* (1980), 445 U.S. 97, all turn on the fact that the state was allowing the producer to fix *another's* price. The Court of Appeal in *Midcal, supra,* at pages 985-986 carefully pointed out that if price posting rather than price fixing were involved, no violation of the antitrust laws would result.

3. Conduct which otherwise might violate the Sherman Act is nonetheless proper if (1) the conduct is compelled by the state (2) as part of a regulatory scheme (3) where the state has supplemented free competition with regulation and the restraint is needed to make the act work. A statement of the doctrine is found in *New Motor Vehicle Board of California v. Fox* (1978) 439 U.S. 96, 109-111:

> "Appellees next contend that the Automobile Franchise Act conflicts with the Sherman Act, 15 U.S.C. § 1 et seq. They argue that by delaying the establishment of automobile dealerships whenever competing dealers protest, the state scheme gives effect to privately initiated restraints on trade and thus is invalid under *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).
>
> "The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption. *Parker v. Brown,* 317 U.S. 341 (1943); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). See

also *City of Layfayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). *New Motor, supra*, 109.

". . . . .

"Appellees also argue conflict with the Sherman Act because the Automobile Franchise Act permits auto dealers to invoke the state power for the purpose of restraining intrabrand competition. 'This is merely another way of stating that the . . . statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—'our charter of economic liberty.' " . . .

"Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a statute invalid, the States' power to engage in economic regulation would be effectively destroyed.' *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978)." (*New Motor, supra,* at 110-111.)

The main state interest is the prevention of price discrimination. The federal cases have long recognized: (a) that major purchasers can put pressure upon a seller for special treatment and (b) that local sales at prices below cost can be subsidized by sales at regular prices elsewhere to destroy the local competition. Subsequently, the local price can be raised again. This is known either as "predatory" pricing under section 1 of the Sherman Act or a Robinson Patman Act violation. (*Moore v. Mead's Fine Bread Co.* (1954) 348 U.S. 115; *Malcolm v. Marathan Oil Co.* (1981) 642 F.2d 845; *United States v. American Tobacco Co.* (1911) 221 U.S. 106, 160-161; *Standard Oil Co. v. United States* (1911) 221 U.S. 1, 42 & 43; Williamson, *Predatory Pricing* 87 Yale L.J. 284; Areeda & Turner, *Predatory Pricing* 88 Harv. L.J. 697.)

One example of an abusive trade practice that cannot be prevented without price posting is found in *AAA Liquors v. Joseph E. Seagram & Sons, Inc.* (10th Cir. 1982) ...... F2d ...... CCH 82-83 Trade Cases § 65,075. In *Seagrams* the Court upheld price discrimination against small retailers in the interest of allowing Seagrams to meet competition. Seagrams was thus able to give special allowances to be passed on only to large chains.

In a market for gum or shoes this would be perfectly proper. In a market like California's where liquor retailers are limited in their sources of supply and where entry is expensive and extensively delayed, such a policy would be catastrophic for small retailers.

The Court of Appeal decision here however, refused to apply the exemption on the ground that the state was insufficiently involved in setting the price (decision, p. 10-11). The approach is wrong. There is no need for the state to fix a price because *no wholesaler sets any price save its own.* There is no umbrella over an antitrust violation, only a compulsion upon a wholesaler to follow its very own prices.

Thus when we consider that posting also helps prevent predatory pricing and aids in pool buying by retailers, valid state purposes therefore exist that were utterly absent in *Midcal.*

In *Serline Wine & Spirit Merchants, Inc. v. Healy, supra,* 512 F.Supp. 936, for example, the Court stated at page 941, footnote 15:

> "The Court noted that 'Dealers who press sham protests before the New Motor Vehicle Board for the sole purpose of delaying the establishment of competing dealerships may be vunerable to suits under the federal antitrust laws.' [Citation omitted] 439 U.S. at 110 n. 15, 99 S.Ct. at 412 n. 15. This Court believes that what is really behind the Supreme Court's clear

articulation and active supervision test announced in Midcal, to successfully invoke Parker protection, is the fear that 'a gauzy cloak of state involvement' only creates a 'sham' for 'what is essentially a private price fixing arrangement.' "

"When the facts of *Midcal, Lafayette, Cantor* and *Goldfarb* are placed beside those of *Bates, Orrin* and *Parker* it is readily apparent that the Supreme Court saw the essential private, proprietary interest seeking to shield itself from liability—resulting in denying antitrust immunity and causing the creation of the two-pronged test in Midcal. The history of each case provides the best insight to the meaning of the legal test for Parker immunity and must not be viewed solely within the factual vacuum wherein it is announced."

(See also *George W. Cochran Co. v. Comptroller, Etc.* (Md. 1981) 437 A.2d 194, 198; *Estate of Effron* (1981) 117 Cal.App.3d 915, 921 et seq.) The distinction is also clear in *Seagram & Sons v. Hostetter* (1966) 384 U.S. 35 wherein a price affirmation statute, requiring the posting of prices, was upheld. The New York statute also required no deviation from those prices for the requisite period.

Just as the New York interest was held sufficient to justify limits upon competition, so also California's interest in preventing price discrimination is sufficient here and must be upheld.

In *Rice v. Norman Williams Co. supra,* ...... U.S. ...... [73 L.Ed.2d 1042] the majority stated:

"A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect. See, e.g., *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 110-111 (1978); *Exxon Corp. v. Governor of Maryland,*

437 U.S. 117, 129-134 (1978); *Seagram & Sons v. Hostetter,* 384 U.S. 35, 45-46 (1966).

"A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy. In *California Liquor Dealers v. Midcal Aluminum, Inc.* 445 U.S. 97 (1980), we examined a statute that required members of the California wine industry to file fair trade contracts or price schedules with the State, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers *must* post a resale price schedule for that producer's brands. We held that the statute facially conflicted with the Sherman Act because it *mandated* resale price maintenance, an activity that has long been regarded as a per se violation of the Sherman Act. *Id.,* at 102-103; see *Dr. John Miles Medical Co. v. John D. Park & Sons Co.,* (1911) 220 U.S. 373, 407-409 [Emphasis by the court; fn. omitted.]

"By contrast, in *Seagram & Sons v. Hostetter, supra,* we rejected a facial attack upon § 9 of New York's Alcoholic Beverage Control Law, which required retailers and wholesalers to file monthly price schedules with the State Liquor Authority accompanied by an affirmation that the prices charged were no higher than the lowest price at which sales were made anywhere in the United States during the preceding month. *Id.,* at 29-40. The Court found no clear repugnancy between § 9 and the federal antitrust laws:

" 'The bare compilation, without more, of price information of sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act. Section 9 imposes no irresistible economic pres-

sure on the appellants to violate the Sherman Act in order to comply with the requirements of § 9. On the contrary, § 9 appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country. . . . Although it is possible to envision circumstances under which price discrimination prescribed by the Robinson-Patman Act might be compelled by § 9, the existence of such potential conflicts is entirely too speculative in the present posture of this case. . . .' *Id.*, at 45-46, . . . (citations omitted). [Fn. omitted.]"

"Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into the category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract." (*Rice v. Norman Williams Co., supra,* 73 L.Ed. at 1049-1051.)

The major material difference between the majority and the concurring opinion is the view as to when a state statute is preempted by Sherman. The majority felt that a state statute will not be invalid absent a per se violation creating an irreconcilable conflict with Sherman. The majority envisioned however, that a *private* antitrust action might lie against *particular conduct* taken (fn. 8). For ex-

ample, one may refuse to deal with another. However, if the refusal to deal is based upon the refusal of the other party to accept illegal conditions, there is an antitrust violation. (*Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.* (9th Cir. 1969) 416 F.2d 71, 76-77.)

The minority however felt that on a sufficient showing of anticompetitive effect a state statute can be held invalid. The majority clearly felt to the contrary: anticompetitive effect is not enough regardless of the evidence, to invalidate a state statute that does not permit a per se violation.

We respectfully submit that the majority view in *Norman Williams* is the preferred public policy. Under it a state statute must clearly on its face allow or compel per se conduct to be rejected. It is an easy test to apply and recognizes the fact that most regulation lessens competition to some extent. It further recognizes the underlying basis of our federal system—that the states are also sovereign except when they clearly conflict with the Constitution or federal statutes.

Moreover, it leaves economic public policy in the hands of the elected representatives where it belongs. Historically, social progress was retarded in this country because courts used the "contracts," and "due process" clauses to determine for themselves the desirability of legislation. Only after a long struggle was the Holmes-Brandeis view accepted. This Court has recognized that caution must be utilized when dealing with mere economic issues to insure that the older practice is not revived in new garb.

This, however, is precisely what the *Lewis-Westco* decision and the test propounded by the concurring opinion in *Norman Williams* would do as it involves a subjective standard—does the anticompetitive effect outweigh a valid state interest. Consider the test in practice: a municipality often limits the number of taxi permits and regulates the price. Cities and counties engage in zoning. Under the

minority test, used by the California Court of Appeal in *Lewis-Westco,* it would be possible to litigate the questions of whether the anticompetitive effects outweigh the clearly valid purposes as a question of fact. The questions of whether a few more permits should be issued; whether taxi rates are a little too high; and whether a market should not be built on a vacant tract are often subjective in nature. Yet *Weinberger v. Salfi* (1975) 422 U.S. 749, 772-774 teaches that lines must be drawn somewhere even though they could as easily be drawn somewhere else.

The mere existence of similar and even identical wholesale prices does not mean that the prices are anticompetitive. Perfect competition can result in the same situation. (*Independent Iron Works, Inc. v. United States Steel Corp.* (9th Cir. 1963) 322 F.2d 656, 665; *United States v. Int. Harvester Co.* (1927) 274 U.S. 693, 708-709; *Joseph E. Seagram & Sons Inc. v. Hawaiian Oke & Liquors, Ltd., supra,* 416 F.2d at 84-85; *F.T.C. v. Lukens Steel Co.* (D.C. 1978) 454 F.Supp. 1182, 1190.) *Davidowitz v. San Diego Dental Society* (Cal. 1983) .... F. Supp. .... CCH 83 Trade Cases § 65,231 (Fact that others knew prices was not price fixing).

The above cases clearly establish that similar pricing without more is simply *insufficient* to find a Sherman Act violation. The *Lewis-Westco* decision followed *Rice v. Alcoholic Bev. Etc. Appeals Bd., supra,* 21 Cal.3d 431, however in drawing great inferences from the similarity. We fail to see similarity in pricing as economically or legally significant, especially since the purpose of price advertising and posting is to encourage competition, which will lead to price similarity.

Only the myopic would argue that price posting does not have some effect toward stabilizing the prices. The Legislature however has determined that prevention of price discrimination and protection of the small retailer from

bankruptcy—the past history of Standard Oil's business methods give ample support for the inference—justify the statute. This Court itself has very recently revitalized price discrimination and ruled that even a state can be guilty of it. *Jefferson County v. Abbott Labs* (1983) .... U.S. .... [51 U.S. Law Week 4195 (Feb. 23, 1983)].

REASONS FOR GRANTING THE WRIT

(a) The issue is novel in this Court in that while *California Liquor Dealers v. Midcal Aluminum* (1980) 445 U.S. 97 holds that per se vertical price fixing in the absence of sufficient state involvement and absent a legitimate state interest is invalid, this Court has also held that unless a state statute limiting competition is clearly preempted as a per se violation, it will not be held to violate the Sherman Act. *Rice v. Norman Williams Co.* (1982) .... U.S. .... [73 L.Ed.2d 1042]. Here the issue is whether a state system not permitting an explicit per se violation (since the wholesaler sets only its own price), having the purpose of preventing price discrimination and predatory pricing, is invalid because it tends to stabilize prices. Rule 17(c)

(b) The *Lewis-Westco* decision and a recent decision by a California United States District Court—*Enricos v. Rice, et al.*, (N. Dist. Cal. No. C 81-0068 EFL), are in direct conflict as *Enricos* upholds the very same statute from a Sherman based attack. See Appendix F.[2] Federal courts have upheld similar systems in other states. *Morgan v. Division of Liquor Control, Etc.* (2d Cir. 1981) 664 F.2d 353; *Fisher Foods, Inc. v. Ohio Dept. of Liquor Control* (Ohio 1982) .... F.Supp. .... CCH 82-83 Trade Cases § No. 65,156.

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[2]The Ninth Circuit has granted a motion for an interlocutory appeal. Appellant's brief has been filed in the Court of Appeals. Since the stay by this Court was denied, the Department is no longer enforcing price posting. If certiorari is denied here, *Enricos*

(c) The cases are in conflict as to the state action exemption. This decision and the Ninth Circuit differ from the Second and Seventh Circuits as to the true meaning of the state action exemption. In *Miller v. Oregon Liquor Control Com'n* (9th Cir. 1982) 688 F.2d 1222 and in *Knudsen Corp. v. Nevada State Dairy Commission* (9th Cir. 1982) 676 F.2d 374, state action has been defined to mean that the state must be involved in the actual setting of the prices charged. In contrast the Second Circuit held price *posting* satisfied the state action exemption in that the state had frequently debated the policy and mandated the postings. (*Morgan v. Division of Liquor Control, Etc., supra,* at 356.) In short, the meaning of "active state supervision" is a subject of conflict in the lower courts. We contend that where there is no per se violation the "active state supervision" requirement is satisfied by allowing competitive forces to work. It is illogical to force a state to choose between complete freedom or complete regulation of an area. It is much better to reconcile the two values by as little restraint as possible while allowing competition to exist. See for example *Town of Hallie v. City of EAU Clair* (7th Cir. 1983) .... F.2d .... CCH 83 Trade Cases § 65,227 (if private parties are not given power to control prices no active supervision required).

The issue was not addressed in *Midcal Aluminum, Inc.* in that the violation was per se and the California decision pointed out it was *not* a case where a wholesaler set only its own price (*Midcal Aluminum, Inc. v. Rice* (1979) 90 Cal.App.3d 979, 984-86.) See *Battipaglia v. New York State Liquor Authority* (NY 1982) CCH 82 Trade Cases § 64,964.

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will probably be dismissed as moot because it involves only injunctive relief. There is a case in State Court of Appeal in Los Angeles awaiting submission on price posting depending upon granting or denial of certiorari here. (*Mutual Wholesale v. Alcoholic Beverage Control Appeals Board*, 2 Civ. 64400)

In essence in contrast to *Midcal* price posting *inhibits* the power of wholesalers rather than granting extra economic power: they are forced to disclose their prices and cannot sell above or below them for the required period.

(d) There is a conflict between judicial interpretations of the Sherman Act and the First Amendment cases of this Court. *Lewis-Westco, supra,* and *Knudsen, supra,* proceed from the premise that publication of price information fosters price fixing. Yet this Court in *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748 stated that forbidding price advertising led to diminished price competition. (See also *Bates v. State Bar of Arizona* (1977) 433 U.S. 350 and *In re R.M.J.* (1982) 455 U.S. 191.) What then is the rule: Does price disclosure lead to price fixing or does it lead to price competition?

(e) Did Congress Intend To Allow State Liquor Statutes To Be Invalidated By A Commerce Clause Or Sherman Act Attack.

While the Court considered this issue in *Midcal* we think it misperceived the thrust of the argument. When the judicial and legislative history of state liquor regulation is considered, it is clear that Congress intended the Sherman Act to apply to private parties in the liquor business but did *not* intend its Commerce Power (and by inclusion the Sherman Act) to invalidate state mandated liquor regulation. The year the Sherman Act was enacted—1890—is the key. This Court held an Iowa liquor statute invalid as conflicting with the Commerce Clause. *Leisy v. Hardin* (1890) 135 U.S. 100.

In rapid response to this decision Congress passed the Wilson Act, 22 U.S.C. § 121, which withdrew Commerce Clause protection. When this Court subsequently limited state liquor legislation Congress passed the Webb-Kenyon

Act, 27 U.S.C. § 122, again removing Commerce Clause protection from liquor. Indeed the title of Webb-Kenyon makes it obvious that the intent was to *withdraw* Commerce Power.

How ironic then is the assumption that the Sherman Act —passed the same year as Congress withdrew its power over liquor and dependent itself upon the Commerce Clause for its validity—should be used to invalidate state regulatory systems.

The Wilson Act and Webb-Kenyon remain valid statutes today and should be followed. Moreover Congress in abolishing the fair trade exemption specifically stated, via the Senate Judiciary Committee, that liquor laws would not be affected. U.S. Code and Administrative News 1975, p. 1571.

Such a position would not give a blanket immunity to private parties—only to the extent that conduct is *compelled* by state law as part of a regulatory scheme would conduct be sheltered. Thus horizontal agreements to fix prices would still remain illegal.

The commerce power should not be used in light of clear legislative history, as in *United States Brewers v. Healey* (2d Cir. 1982) 692 F.2d 275, to strike down liquor price posting regulations.

(f) The Existence Of The 21st Amendment Should be Considered.

The issue can be framed simply: whereas the 21st amendment does not shield a state statute requiring what would otherwise be a per se violation where no substantial reason or interest is given for it (*Midcal*), does the 21st Amendment protect a state statute *not* allowing a per se violation—since each wholesaler binds only itself—where there *is* a substantial state interest. Whether analyzed in

terms of the state action exemption or the 21st Amendment, the result should be to uphold the statutory system at issue.

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